ACEC
American Council of Engineering Companies
of Michigan

Memo

To: Senator Wayne Kuipers

Members of the Senate Judiciary Committee

From: Ron Brenke, ACEC & MSPE

Rae Dumke, AIA-MI

Date: 3/31/09

Re: Senate Bill 35 – Statute of Limitations

The members of the American Council of Engineering Companies, the American Institute of Architects – Michigan Chapter and the Michigan Society of Professional Engineers are grateful to Chairman Kuipers for the opportunity to testify before the House Judiciary Committee regarding Senate Bill 35. This bill is a reintroduction of SB 865 from 2007 which was passed out of the Senate Judiciary and the Senate. The legislation remains critical to our industry at a time our business is suffering.

In 2006, the Michigan Supreme Court issued a ruling which changed existing law and significantly lengthened all statues of limitations for the design and construction industry. The longer statutes do not reflect the original intent of the legislature which had been in place for 100 years. Senate Bill 35 only restores the intent of the legislature.

Enclosed please find the complete analysis of SB 35 and its supporting documentation.

We ask for your support of SB 35!

LEGISLATIVE ANALYSIS

SB 35 - If passed would:

- **Reverse a 2006 Supreme Court ruling that ignored the intent of Michigan's Legislature;**
- **Re-establish the law as stated in *Witherspoon v. Guilford (1994);***
- **Re-establish all previous statutes of limitations for the construction industry;**
- **Re-establish stability in the law for the design & construction industry;**
- **Make Michigan a better place to build and conduct business.**

Primary Sponsor – Sen. Alan Sanborn

The Problem (Overview): In 2006, the Michigan Supreme Court issued its ruling in *Ostroth v. Warren Regency, 474 Mich. 36; 709 N.W.2d 589 (2006).* *Ostroth* changed the existing law and significantly lengthened all statutes of limitations for the design and construction industry. The longer statutes of limitations created by the Court do not reflect the original intent of the Legislature and directly contradict Michigan's strong public policy of preventing stale claims. Further, the ruling creates new confusion and instability in the legal environment for the construction industry, because *Ostroth* leaves completely open the question of when the statute begins to run for claims on incomplete projects.

Legislative Intent Ignored: For 100 years in Michigan, the statute of limitations for architectural malpractice has been 2 years, running from the date of the last professional services rendered. (There was no "engineering malpractice" in the 19th and early 20th century because engineering was incorporated into the practice of architecture) Negligence claims against contractors have long been subject to a three-year statute of limitations. The *Ostroth* Court repealed these statutes, even though the Legislature never repealed them but instead chose to preserve them.

Limitations and Repose: 40 years ago, the law was changing and the legal barrier of privity began eroding. Liability exposure for architects and engineers therefore expanded. The Legislature responded, and continued Michigan's strong public policy against stale claims, by enacting the "architects and engineer's statute" which established a 6-year statute of repose, MCL 600.5839. The statute of repose did not repeal any existing limitations periods, but was intended to work in concert with the existing statutes of limitations, found in MCL 600.5805. Contractors were later included within the protections of the statute of repose, by amendment.

Good Jurisprudence - *Witherspoon:* The well-reasoned case of *Witherspoon v. Guilford, 203 Mich. App. 240; 511 N.W.2d 720 (1994,)* explained how the various statutes of limitation of MCL 600.5805 and the 6-year statute of repose established by MCL 600.5839 were intended to work together to protect architects, engineers, contractors and surveyors from stale claims. *Witherspoon* gave effect to the original intent of the Legislature and advanced a wise policy.

Poor Jurisprudence - *Ostroth*: The *Ostroth* Court confused the concepts of limitations and repose, and ruled that MCL 600.5839 was the *only* statute applicable. Under *Ostroth*, all limitations periods in the construction industry are 6 years from the date of first use, occupancy or acceptance of the improvement. In trying to "fit a square peg in a round hole," the *Ostroth* Court was unable to address the limitations period for claims arising from incomplete projects, which creates a new and unresolved gap in the law. The *Ostroth* court directly overruled the intent of the Michigan Legislature and the policy reflected in the statute, and has made Michigan a riskier and more costly place to build. SB 35 would reverse *Ostroth* and re-establish our previous long-standing law.